**Editor's note: 82 I.D. 242**

STATE OF ALASKA

DEPARTMENT OF HIGHWAYS

IBLA 75-280 Decided May 19, 1975

Appeal from the decision of the Alaska State Office of the Bureau of Land Management which canceled a material site right-of-way issued pursuant to the Federal Aid Highway Act.

Vacated and remanded.

1. Rights-of-Way: Cancellation -- Rights-of-Way: Federal Highway Act

   Section 108 of Title 23, United States Code, does not require a state to file with the Department of the Interior proof of construction or utilization of a material site right-of-way issued pursuant to the Federal Aid Highway Act.

The "Secretary" referred to in that section is the Secretary of Transportation, and administration of that provision is a function of the Department of Transportation. Therefore, an apparent failure of compliance by the state does not mandate summary cancellation of the right-of-way by the Department of the Interior.

2. Rights-of-Way: Cancellation -- Rights-of-Way: Conditions and Limitations -- Rights-of-Way: Federal Highway Act

The Bureau of Land Management in granting a material site right-of-way pursuant to 23 U.S.C. § 317 (1970), may impose special terms and conditions which are not incompatible with the Act or the public interest, and a failure on the part of the grantee to comply will make the right-of-way subject to cancellation.

3. Rights-of-Way: Cancellation -- Words and Phrases

Where a regulation recites that a right-of-way "shall be subject to cancellation" for

> violation of its terms and conditions, the authorized officer is invested with the discretion to cancel or not, depending upon the circumstances.

APPEARANCES: Jack M. Spake, Central District Engineer, and Donald E. Bietinger, Central District Right of Way Agent, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

On July 26, 1966, the Anchorage office of the Bureau of Land Management (BLM) granted appellant a material site right-of-way pursuant to the Federal Aid Highway Act of August 27, 1958, 23 U.S.C. § 317 (1970). The grant was not subject to expiration upon a specific term of time, but it was expressly conditioned upon compliance with the applicable regulations and the filing of "proof of construction" within seven years from the date of the grant, as well as various other terms and conditions.

On June 30, 1972, the State of Alaska Department of Highways filed its "Proof of Construction and Utilization" in the form of sworn affidavits by the Southcentral District Highway Engineer and the District Right of Way Engineer, each of whom asserted that the material site has been utilized and will continue to be

utilized for construction and maintenance of that specific project described in the original right-of-way application.

Apparently the filing of this proof engendered some disbelief on the part of a Bureau employee, who is identified only by initials, who noted in the file, "I don't think this has been constructed." A field examination was conducted for the purpose of determining "if the construction has been completed on this R/W." The examiner reported that no attempt had been made to construct the material site or the haul road, and he recommended that the proof of construction and utilization submitted by the Department of Highways be rejected. The BLM's Area Manager and District Manager each concurred in these findings and the recommendation.

The BLM's Alaska State Office then wrote to the Department of Highways, informing it of what had transpired and inviting it to submit information "to show conclusively that the land was used as specified in the proof of use," failing in which, the BLM advised, "the right of way will be canceled."

After some delay the highway department requested an extension of the time for filing proof of use until 1977, noting that it had programmed construction in 1975 which would utilize this right-of-way and materials source. This was reiterated in a subsequent

letter, which further advised that the construction scheduled for 1975 is, in fact, a Federal-aid project to be funded, in part, with Federal funds.

Nevertheless, by its decision of November 29, 1974, the BLM's Alaska State Office canceled the right-of-way. The decision stated that a regulation (43 CFR 2802.22) 1/ and statute (23 U.S.C. § 108) provide a seven-year period for filing proof of construction or use, and that the Federal Aid Highway Act does not provide for an extension of time for filing such proof.

The Department of Highways has appealed, disputing the applicability of the regulation and the section of the statute cited in the decision, as well as the Bureau's interpretation of those provisions. Appellant further points to the only provision in the Act for termination of such a right-of-way, 23 U.S.C. § 317(c), which states:

> If at any time the need for any such lands or notice of the fact shall be given by the State highway department to the Secretary [of Transportation] and such lands or materials shall immediately revert to the control of the Secretary of the Department from which they had been appropriated.

1/ An apparent typographical error. The decision was probably intended to read "43 CFR 2802.2-2."

Additionally, appellant asserts that it did in fact utilize a potion of the right-of-way for a Federal-aid project in 1967 for the roadway paving improvement on Project F-046-1(6), Tok Cut-Off, mile -0- to 9.5. It also states that Federal funds were expended for survey and soils exploration, and for the access road to this material site. Moreover, appellant states:

> The location of the Material Source is critical to the proposed Federal Aid Highway Project F-046-1(3) and Project F-046-1(6) scheduled for construction in 1975, which includes grading, widening and paving of 16.1 miles.
>
> The site area has been listed as a Material Source because of its particular location advantage to this project and has been designated a source capable of producing 500,000 cubic yards of suitable road building material for the project. The nearest Material Source is approximately 4 miles in one direction and approximately 6 miles in the other direction, indicating the immediate need for a Material Source within an economical haul distance.

[1] We agree with the appellant that 23 U.S.C. § 108 (1970) does not require a state to furnish proof of construction to the Department of the Interior within seven years. The "Secretary" referred to in that section originally meant the Secretary of Commerce and now means the Secretary of Transportation, and administration of this provision is a function of the Department of Transportation. Therefore, a failure of compliance by the State does not mandate summary cancellation of the right-of-way by the

Department of the Interior. Accordingly, we find that the BLM's reliance on 23 U.S.C. § 108 (1970) was misplaced. 2/

[2] However, notwithstanding the confusion concerning the applicability of section 108, there is nothing which prevented the BLM from independently imposing a separate requirement for proof of construction within seven years, which it did in this case by special stipulation. The stipulation is not incompatible with section 108, or with any other provision of the Act, nor is it incompatible with the public interest. This requirement being an express condition of the grant, we need not further concern ourselves with section 108, but we may proceed in an effort to discover whether appellant complied.

The "Proof of Construction and Utilization," consisting of the notarized statements of two of appellant's supervisory engineers, was timely filed. Their allegations of prior utilization, although disputed by BLM, is reiterated on appeal. This is clearly a question of a controverted fact concerning which both sides might have provided more evidence. A letter in the file alludes to a meeting held at BLM's district office and to a conversation between a BLM

2/ Judge Fishman believes that 23 U.S.C. § 108 (1970) has no applicability whatsoever to material sites, but is only applicable to highways.

adjudicator and appellant's District Right of Way Agent. Although both the meeting and the conversation apparently concerned the filing of the proof and BLM's rejection of it as unacceptable, the case record has not been documented to reflect what transpired. On the basis of the existing record we are unable to decide whether the proof should have been accepted or not.

We must necessarily consider whether the Bureau has the authority to summarily cancel a material site right-of-way granted pursuant to 23 U.S.C. § 317 (1970) in any event. No such authority is expressly created by the Act. However, the Secretary of the Interior, in promulgating regulations for the implementation of the Act, has recognized an inferred authority to cancel such a right-of-way. 43 CFR 2821.5 provides that such grants "will be subject to (1) all the partinent regulations of this part * * *, and (2) any conditions which he [the authorized officer of the BLM] deems necessary." 43 CFR 2802.2-3 provides:

> Unless otherwise provided by law, rights-of-way are subject to cancellation by the authorized officer for failure to construct within the period allowed and for abandonment or nonuse.

43 CFR 2802.3-1 states:

> All rights-of-way approved pursuant to this part, except those granted for pipelines pursuant to section 28 of the Act of February 25, 1920, as amended August 21, 1935 (49 Stat. 678; 30 U.S.C. 185), shall be subject to cancellation for the violation of any of the provisions of this part applicable thereto or for the violation of the terms or conditions of the right-of-way. No right-of-way shall be deemed to be canceled except on the issuance of a specific order of cancellation.

Quite clearly, then, the regulations make such rights-of-way subject to cancellation by the authorized officer for nonconstruction, nonuse, abandonment, violations of the regulations, or of the terms and conditions of the grant. See Southern Idaho Conf. of 7th Day Adventists v. United States, 418 F.2d 411 (9th Cir. 1969).

[3] The fact that a right-of-way is subject to cancellation under these circumstances does not mean that it must be canceled. The employment of the words "subject to" [an action] in a regulation has been held to invest the administrative officer with the discretion to determine whether noncompliance in a given instance should be excused or whether the prescribed penalty should be imposed. Tagala v. Gorsuch, 411 F.2d 589 (9th Cir. 1969); Pressentin v. Seaton, 284 F.2d 195 (D.C. Cir. 1960). Use of the term "subject to" said the Court in Pressentin, "left the door wide open to a consideration of circumstances." At 199.

Having concluded that if the appellant failed to comply with the special stipulation, the authorized officer of the Bureau had the authority to cancel the right-of-way at his discretion, we turn now to an examination of whether cancellation was appropriate under the circumstances.

First, we again note that it is not conclusively established that there was in fact a failure of compliance by the appellant. Next, we note appellant's assertion of an immediate need for the material for use in a Federal-aid project. Further, we find that there has been no consultation with the Department of Transportation regarding the effect of the action taken on federally funded highway projects with which that agency is properly concerned under the Act. Finally, there is no showing of any need for the land involved for any other supervening public purpose. Indeed, the decision of the Alaska State Office recites that, "This cancellation is without prejudice to the grantee's right to submit a new application for a right-of-way covering the same lands if the site is still needed for construction and/or maintenance of a Federal-aid highway."

In these circumstances we do not find that it was necessary or desirable in the public interest to summarily cancel the right-of-way.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated. However, the State of Alaska Department of Highways is directed to file an acceptable proof of construction and/or utilization of this site on or before September 30, 1976, failing in which the right-of-way shall be subject to cancellation.

Edward W. Stuebing
Administrative Judge

We concur:

Joseph W. Goss
Administrative Judge

Frederick Fishman
Administrative Judge